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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 588.

PERRY ZIMMERMAN,

Petitioner,

vs.

BOARD OF EDUCATION OF THE CITY OF NEWARK and EDWARD F. KENNELLY, Superintendent of Schools,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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Opinions Below.

The following opinions below are appended to the Petition: the opinion of the State Commissioner of Education, not officially reported (App. B,* pp. 19 to 29); the opinion of the State Board of Education, not officially reported (App. A, pp. 16 to 19); and the 1962 opinion of the New Jersey Supreme Court and the concurring opinions, reported at 38 N. J. 65, 183 A. 2d 25 (App. C, pp. 31-62).

* "App." as used herein refers to the Appendix to the petition for certification.

The opinion of the New Jersey Supreme Court in the companion case of *Laba* v. *Newark Board of Education*, 23 N. J. 364, 129 A. 2d 273 (1957); in which petitioner and two others (Laba and Lowenstein) were appellants, and the opinion of the State Commissioner of Education, not officially reported, in the same case, are not appended to the Petition. The Commissioner's opinion in that case, however, appears at pp. 9a to 18a of the printed volume identified as the "Joint Appendix" in *Laba* and filed with this Court as part of the record below.

Two opinions (not appended to the petition) of the New Jersey Supreme Court in the separate appeals of one of the *Laba* appellants (Lowenstein) to that court, in cases which may be considered as companion cases to petitioner's case, contain holdings applicable to the instant matter. They are reported as *Lowenstein* v. *Newark Board of Education* ("*Lowenstein I*"), 33 N. J. 277, 163 A. 2d 156 (1960), and *Lowenstein* v. *Newark Board of Education* ("*Lowenstein II*"), 35 N. J. 94, 171 A. 2d 265 (1961).

Questions Presented.

1. Was any federal question raised below on petitioner's present claim that he has acquired tenure of office?
2. Does a New Jersey public school teacher engaged for an academic year, who under New Jersey law had no contract for or right to employment beyond that year, who was dismissed before the end of that year on charges that he refused to answer, before a sub-committee of the House Un-American Activities Committee, questions relating to Communist Party affiliations, and whose dismissal was set aside by the State courts on

the basis of the procedural principles of *Slochower* v. *United States*, 350 U. S. 551 (1956), acquire, by reason of the invalidated dismissal, more than the right to service credit and salary for the full academic year covered by his employment contract?

3. Is petitioner, who was engaged as a teacher by respondent pursuant to New Jersey law for the 1954-1955 academic year ending June 30, 1955, and whose dismissal before the end of the academic year was set aside for the reason stated in "1", entitled to any employment or tenure rights which he would not have had under New Jersey law if he had served for the full academic year without interruption, and to which he is not entitled, under New Jersey law, even on the basis of full service credit for all of the 1954-1955 academic year covered by his employment contract?

4. Can petitioner acquire tenure of office as a teacher otherwise than as provided by the New Jersey tenure statutes on the basis of full credit for the periods during which he actually served as a teacher together with full credit for the periods during which he was entitled to serve under his contract of employment?

Statutes Involved.

New Jersey Statutes.

In addition to the New Jersey teacher tenure statute, R. S. 18:13-16, set forth in the petition (pp. 4-5) the following New Jersey statutes are involved:

R. S. 18:13-11. *Dismissal without good cause before expiration of contract.*

When the dismissal of any teacher before the expiration of a contract entered into between the teacher and a board of education shall, upon appeal, be decided to have been without good cause, the teacher shall be entitled to compensation for the full term for which the contract was made; but it shall be optional with the board of education whether or not the teacher shall teach for the unexpired term.

R. S. 18:6-20. *Acts requiring majority of whole board.*

No principal or teacher shall be appointed • • • except by a majority vote of the whole number of members of the board.

R. S. 18:13-6. *Teachers' contracts.*

Notwithstanding any provision of the law fixing or authorizing the fixing of the fiscal year from January first to December thirty-first or declaring for purposes of adjustment a fiscal year from July 1st to December thirty-first or providing for the making of appropriations on the basis of the calendar year, any board of education may enter into contracts for the services of teachers and other employees and fix and determine their salaries for the period from July first of any year for which such board shall have been organized, to June thirtieth of the succeeding year.

R. S. 18:6-13. *Organization of boards in cities of the first class.*

On July first of each year, or on the following day if that is Sunday, the board of education of every school district in a city of the first class shall organize by electing one of its members as president and another as vice-president, which officers shall

serve for one year and until their respective successors are elected.

(NOTE: Newark is a "city of the first class".)

Statement.

Petitioner and two other Newark school teachers (Laba and Lowenstein) were suspended on May 19, 1955 and were dismissed on June 28, 1955 by the Newark Board of Education (hereinafter identified as the "Board") as of the effective date of the suspension, May 20, 1955, on charges relating to their refusal to answer, before a sub-committee of the House Un-American Activities Committee, questions relating to affiliations with the Communist Party.

At the time of the suspension and dismissal, Laba and Lowenstein had tenure of office under R. S. 18:13-16, and the procedural provisions of R. S. 18:13-17 applied to them. Petitioner, however, was serving under a contractual engagement for the 1954-1955 academic year ending June 30, 1955, had no tenure at the time of his suspension and dismissal, and would not have acquired tenure even with service credit for the full 1954-1955 academic year (App. C, item "I", pp. 38-39).

Because the New Jersey statutes do not specify the procedures to be followed on charges made against non-tenure teachers before the end of their contractual term, the Board accorded to petitioner the same procedures which were accorded under R. S. 18:13-17 to the two tenure teachers (App. C, pp. 42-43).*

* There is a typographical error at App. p. 42, line 27. As the official reports of the applicable opinions of the N. J. Supreme Court show, the word "invokes" should be "involves."

The State Commissioner of Education (hereinafter identified as "Commissioner") ruled that the hearings held on the charges did not fulfill the due process requirements of *Slochower* v. *Board of Education*, 350 U. S. 551 (1956), which was decided while the appeals of the three teachers were pending, reversed the dismissals, and remanded the three cases for further proceedings by the Board. The New Jersey Supreme Court affirmed: *Laba* vs. *Newark Board of Education*, 23 N. J. 364, 129 A. 2d 273 (1957). The court held that the conduct of the teachers before the Congressional sub-committee warranted inquiry by the Board and the Superintendent of Schools as to whether they (a) "contumaciously or frivolously refused to answer before the House sub-committee" or (b) are "now" members of the Communist Party, or (c) are "now subject to its ideologies and disciplines"; and that if the facts developed in the remand proceedings were adverse to the teachers as to any of the three specified areas —or if they "refused to answer pertinent questions fairly submitted by their administrative superiors • • • then there would seem to be ample basis for board action within the broad and valid statutory standard embodied in R. S. 18:13-17." *Laba*, 23 N. J. at pp. 388, 389; 129 A. 2d at p. 287.

The court, in *Laba*, further ruled that, in the inquiry under the remand, the teachers had "a duty of cooperation and an affirmative burden in the establishment of their fitness" (23 N. J. at p. 392; 129 A. 2d at p. 289) and the "Newark school authorities may interrogate the • • • teachers with respect to their present and past association with the Communist Party and affiliated organizations and

are entitled to frank and full disclosures" (23 N. J. at p. 388; 129 A. 2d at p. 287).

In the remand proceedings the Board reinstated Mrs. Laba on the basis of her representations that she refused to answer before the sub-committee "on advice of counsel," that although she had been a member of the Party she no longer was a member, and that she was not subject to its influence (App. p. 59).

Lowenstein refused to answer, in the administrative inquiry conducted in 1957 pursuant to the remand, questions as to Communist ties prior to the summer of 1953. The Board interpreted *Laba* to mean that this warranted dismissal as of the original suspension in 1955, and dismissed him as of that date. The Commissioner held that the refusal to answer was misconduct which supported dismissal as of the date on which it occurred, but that the dismissal could not go back to the 1955 date because, on the basis of Lowenstein's statement that he refused to testify before the sub-committee "on advice of counsel", the Board made no finding of "frivolous or contumacious" conduct before the committee. The N. J. Supreme Court, in a unanimous decision, reversed and again remanded for further proceedings by the Board. *Lowenstein* vs. *Newark Board of Education*, 33 N. J. 277, 163 A. 2d 156 (1960). The court noted that after Lowenstein told the Superintendent of Schools that "he had claimed the privilege before the subcommittee on the advice of counsel, that subject was quite properly not pursued further. The matter of contumacious or frivolous refusal to answer • • • was thereby permanently removed from the case." (33 N. J. at p. 282; 163 A. 2d, at p. 158.) The court held further that both

Lowenstein and the Board had misconstrued *Laba;* there was no right to inquire into past Communist affiliations unless there was reasonable basis for "doubt" as to "subjection now rather than in the past." If there was, and only then, Lowenstein had to answer as to the past without setting any cut-off date arbitrarily fixed by him.

In the inquiry under the second Lowenstein remand the Board believed that there was a reasonable basis for doubt as to Lowenstein's denial of present Communist affiliations, and decided that his renewed refusal to answer inquiries beyond 1953 warranted dismissal. The New Jersey Supreme Court disagreed (in a 4-3 decision) as to the asserted basis for "doubt" and reversed the dismissal. *Lowenstein* vs. *Newark Board of Education,* 35 N. J. 94; 171 A. 2d 265 (1961).

The Board held its inquiry, under the remand as to petitioner, in 1957 during the same period when the first remand proceedings were conducted in the *Lowenstein* case. The Board concluded that although petitioner gave answers to the questions submitted to him, these answers fell short of the requirements of *Laba.* (Record—"On Motion To Recall Mandate And Petition For Certification" pp. 73a to 76a). The opinions in *Lowenstein I* and *Lowenstein II* having not yet come down the Board assumed (as it did under the first *Lowenstein* remand) that "now" as used in *Laba* related to Communist affiliations at the time of the suspension in May 1955 and that therefore, its finding of failure to "cooperate" in the inquiry under the remand called for dismissal as of that date, and adopted a resolution to that effect.

On appeal to the Commissioner from this action, petitioner claimed for the first time that during the pendency of the *Laba* appeal he had accrued tenure of office. The Commissioner ruled that, in consonance with the *Lowenstein* decisions, the 1957 proceedings could not support a dismissal as of the 1955 suspension, in view of petitioner's testimony at the 1957 inquiry that he had refused to answer before the sub-committee in 1955 on "advice of counsel" (App. B, pp. 21-23). The Commissioner accordingly reversed petitioner's dismissal, decided that this gave petitioner the right to the benefits of his employment contract for the 1954-1955 school year, and ordered that petitioner be paid his salary from the date of his dismissal in May 1955 to the end of that school year. Petitioner's claim that pending the litigation he had accrued tenure of office was rejected (App. B, pp. 23-29) and he appealed from this aspect of the Commissioner's decision. The judgment of the Commissioner was affirmed by the State Board of Education (App. A, p. 16).

The New Jersey Supreme Court unanimously affirmed the decision of the State Board. *Zimmerman v. Board of Education of Newark*, 38 N. J. 65, 183 A. 2d 25 (1962). (The Chief Justice of the state court concurred in a separate opinion which acknowledged that "Our holding that Zimmerman did not have tenure makes academic the finding that, if he had tenure, there nonetheless was cause for dismissal", but argued that on the issue of "cooperation" in the 1957 inquiry the court's mandate in *Laba* had been "disregarded", and the way in which that matter was handled should not be allowed "to pass without an expression of disapproval." This led to another concurring opinion (App. C, pp. 52-60) expressing disagreement by

three members of the court with the views on the "co-operation" issue as set forth in the first one, and holding as to that issue that "the record fully supports the conclusion reached by the Superintendent and the Board of Education." In a third brief concurring opinion one member of the court noted that the decision of the full court that petitioner "never achieved tenure status and therefore is not entitled to reinstatement on that basis" was "dispositive of the case" and there was therefore "no need for an excursion into tangential issues raised by the arguments" (App. C, p. 60). The entire court was thus in agreement that the result reached on the tenure question rendered "academic" the issue of "cooperation" in the 1957 inquiry. The foregoing summary of the concurring opinions is added because petitioner fancies in the "necessity of the Supreme Court of New Jersey to render three concurring opinions in this case" (Pet. p. 11) a significance which cannot be drawn from the opinions, especially in view of the court's unanimity on the tenure question, the only issue on which petitioner requests the intercession of the United States Supreme Court.)

ARGUMENT.

1.

On the tenure issue submitted here no federal questions were raised by petitioner at any stage of the proceedings below.

During the course of the proceedings in *Laba* no claim to tenure was made. In fact it was undisputed there that petitioner's "employment had about six weeks to go at the time of his suspension on May 19, 1955 and his dismissal

involves his status from that date to the end of the 1954-1955 school year." The above quoted assertion was made in the Board's brief in *Laba* (App. p. 42) and was not, at any point in the *Laba* proceedings, controverted by petitioner; and it was recognized by the court in the *Laba* opinion that tenure was not in issue. (23 N. J. at p. 370, 129 A. 2d at pp. 276-277, App. p. 42-43.) The court again in *Zimmerman* noted that it had "expressly recognized in *Laba* that Zimmerman was in a different category than the other two defendants there who were at that time protected by the tenure laws" (App. C, p. 42).

In *Laba* constitutional questions were of course raised and considered with reference to the dismissal question which was resolved in petitioner's favor. But these did not and could not have anything to do with any claim of tenure as to petitioner since as noted above no such claim had been made and was concededly not involved in *Laba*.

At the time of the *Laba* decision it was therefore clear to the parties and the state court that only the 1954-1955 contract year was the employment period under consideration. And even after that decision suggested further administrative inquiry on the dismissal issue, the Superintendent of Schools and the Board on three separate occasions during the course of the ensuing proceedings made note that the proceedings were not to be taken as a recognition of an employment relationship, beyond the 1954-1955 school year in controversy, with tenure implications which up to that point were acknowledgedly not in the case (App. pp. 43-44).

Not until after the Board's second action after the *Laba* decision did petitioner advance a claim to tenure. This he

did during the progress of the appeal leading to the *Zimmerman* decision,—*but only on the basis of state law*. The tenure grounds belatedly urged in the *Zimmerman* case were all *state grounds*, and the tenure issue was submitted in that case on state grounds only and without reference to any federal claim. This appears from the decisions at each level of the proceedings: the opinions of the Commissioner (App. p. 19), the State Board (App. p. 16) and the New Jersey Supreme Court (App. p. 31). As the opinion of the New Jersey Supreme Court shows, the contentions submitted and decided on the tenure issue were that petitioner had obtained tenure under the provisions of the New Jersey statutes (App. pp. 38-40, items "I" and "II"); and that the Board, by conducting the inquiry pursuant to the *Laba* remand, was estopped from denying the accrual of tenure in the course of the appeals (App. pp. 40-44, item "III"). Nowhere along the line of the appeal disposed of in *Zimmerman* was any federal right asserted on the issue of tenure raised in that appeal for the first time. We have been unable to find with reference to the tenure issue any mention of the Fourteenth Amendment or of any federal due process question—the only federal question presented here ("Questions Presented", Pet. pp. 2-3)—anywhere in the record or briefs below. Nor, notwithstanding Rule 23(1)(f), is there any reference to the contrary in the pending petition.

Tenure not having been claimed on any ground in *Laba*,—and having been claimed only on state grounds when it was eventually raised at all, in *Zimmerman*,—there is no federal question before the Court on the tenure issue, the only issue which petitioner asks this Court to review.

2.

This case involves no federal questions.

Petitioner's dismissal for his conduct before the subcommittee of the House Un-American Activities Committee stands reversed. This is the decision of the state court in *Laba* and *Zimmerman, supra.* Petitioner's statement that he "has been unsuccessful in his attempt to remove the stigma of this suspension and his ultimate discharge" (Pet. p. 9) is therefore without substance. He has been unsuccessful only in his attempt to obtain, through the invalidated dismissal, employment benefits which he did not possess when he was dismissed and to which he would not have been entitled as a matter of right under New Jersey law if the dismissal had not occurred.

Petitioner's employment rights at the time of his suspension and dismissal are controlled by the New Jersey school statutes as construed by the state courts. Cf. *Phelps* v. *Board of Education of Town of West New York, N. J.*, 300 U. S. 319 (1937).

In New Jersey a school board is a non-continuous body, without power to bind a successor board except as to those matters for which contrary provision is specifically made by statute. *Skladzien* v. *Board of Education of Bayonne*, 12 N. J. Misc. 602, 173 A. 600 (Sup. Ct. 1934), aff'd 115 N. J. L. 203, 178 A. 793 (E. & A. 1935). In districts like Newark the school board organizes anew on July 1 of each year, and the board's legal year is therefore July 1 to July 1 (R. S. 18:6-13).

The significance attached by the legislature to the process of teacher selection is reflected by R. S. 18:6-20

which requires, for the appointment of teachers, "A majority vote of the whole number of members of the board" as distinguished from a majority of those present at the meeting.

The state legislature has also demonstrated that the principle that a school board cannot take action reaching beyond the life of the board without specific statutory authority applies to the appointment of teachers. In most of the school districts of New Jersey (in fact in all except Newark and Jersey City, the only "cities" to which R. S. 18:6-13 applies) the school board's year is February 1 to February 1 (R. S. 18:6-12). Since the normal academic year ends on June 30 this resulted in an awkward situation, as no board, under the *Skladzien* principle, was able to select teachers for a full school year. This was corrected by the enactment of R. S. 18:13-6, which permits all boards "to enter into contracts for the services of teachers" to June 30th of the year following the year for which the board "shall have been organized." But even under that statute the 1954-1955 Newark school board was without power to take any binding action that would extend the employment of any teacher, including petitioner, for any contract period after June 30, 1955. The claim of petitioner that the reversal of the dismissal before the end of the 1954-1955 school year entitles him to a new employment, with consequent tenure of office, reaching into the next school year, actually rests on a contention that the 1954-1955 board was able to extend to him unintentionally an employment commitment which by the express language of the state statutes, and by the long established rule of *Skladzien*, it was powerless to give intentionally.

The New Jersey courts have consistently held that teacher tenure can be acquired only in the manner prescribed by R. S. 18:13-16. The state's highest appellate court has so ruled in *Ahrensfield* v. *State Board of Education*, 126 N. J. L. 543, 19 A. 2d 656 (E. & A. 1941):

> "It is axiomatic that the right to tenure does not come into being until the precise condition laid down in the statute has been met."

Other decisions to the same effect are *Chalmers* v. *State Board of Education*, 11 N. J. Misc. 781, 168 A. 236 (Sup. Ct. 1933); *Norwitz* v. *Board of Harrison Township*, 128 N. J. L. 13, 23 A. 2d 914 (Sup. Ct. 1942); *Moriarity* v. *Board of Education of Garfield*, 133 N. J. L. 73, 42 A. 2d 465 (Sup. Ct. 1945), aff'd 134 N. J. L. 356, 46 A. 2d 734 (E. & A. 1946). This state policy has been reaffirmed in the decision of the New Jersey Supreme Court in the within matter (App. C, p. 36).

Although the state courts have guarded against invasion of accrued tenure rights, they have not been willing to permit tenure to accrue when the right was not clear under the applicable statutes; and side door entry to teacher tenure status has not been countenanced. *Gordon* v. *State Board of Education*, 132 N. J. L. 356, 40 A. 2d 670 (E. & A. 1945); *Schulz* v. *State Board of Education*, 132 N. J. L. 345, 40 A. 2d 663 (E. & A. 1945); *Moresh* v. *Board of Education of Bayonne*, 52 N. J. Super. 105, 144 A. 2d 897 (App. Div. 1958).

The New Jersey legislature has taken pains to define the rights of a teacher not under tenure and serving for a contract term (which was precisely the status of petitioner at the time of his 1955 dismissal) when a dismissal before the

expiration of the contract "shall, upon appeal, be decided to have been without good cause." R. S. 18:13-11 provides that in such case,

> "* * * the teacher shall be entitled to compensation for the full term for which the contract was made; but it shall be optional with the board of education whether or not the teacher shall teach for the unexpired term."

The state court recognized in *Laba* that this was the statute which was applicable to petitioner's employment at the time he was dismissed. (23 N. J. at p. 370; 129 A. 2d at pp. 276-277.) (In passing it is necessary to point out that the reference—at page 7 of the petition—to the testimony of petitioner's principal, is misleading. As to the portion cited in the petition the actual testimony in its appropriate context (Record, "Transcript of Hearing, Perry Zimmerman, November 14, 21, 25, December 18, 1957", at page 72) is that "tenure automatically comes after an appointment of the fourth year"—which of course is the law under R. S. 18:13-16(b), as petitioner concedes: tenure on the basis of academic years of service can arise only after a "fourth contract" for service has been made (Pet. pp. 7-8). To the extent that the principal's version of the statute may be read to mean something else, the state court in *Zimmerman* held that it "overlooks the nature of the employment between a teacher and the Board" under the controlling state statutes and decisions.)

The *Nelson* and *Vitarelli* cases cited by petitioner at page 13 of the petition are not relevant to the within matter. In *Vitarelli v. Seaton*, 359 U. S. 535 (1959), the employee was serving in a position which was not in a tenure

category. Although he could have been discharged without cause, the government chose to dismiss him as a security risk but in doing so violated its own procedural rules governing dismissals on security grounds. During the pendency of his appeal the government invoked another dismissal procedure which this Court held could not influence the disposition of the appeal, since the pendente lite action of the government was taken only to "moot" the appeal. As was pointed out in *Dillon* v. *LaPeer State Home*, 364 Mich. 1, 110 N. W. 2d 588, 599 (Sup. Ct. 1961), the proposition represented by *Vitarelli* is that "where an authority's discretion is unbridled by law, the authority is nonetheless to follow the procedures it establishes for the removal of employees * * *." In *Vitarelli* and also in *Nelson* v. *Los Angeles County*, 362 U. S. 1 (1960), the employee was serving under an open end appointment which remained in force until it was lawfully terminated. Petitioner was serving for a fixed term ending June 30, 1955 and he had no employment rights thereafter unless he was given a new contract for the following academic year in the manner prescribed in R. S. 18:6-20, *supra*. Moreover no statute comparable to R. S. 18:13-11, *supra*, was involved in either *Vitarelli* or *Nelson;* and neither *Vitarelli* nor *Nelson* dealt with the kind of claim made by petitioner—a claim to tenure of office in municipal employment.

In view of the exceptional measures taken by the New Jersey Supreme Court to insure protection of the constitutional rights of the teachers in the *Laba*, *Lowenstein I*, *Lowenstein II*, and *Zimmerman* cases there is no warrant for petitioner's present allegation that there was a "refusal by the New Jersey Supreme Court * * * to give any

credence to petitioner's constitutional rights" in alleged "complete opposition" to other decisions of this Court (Pet. p. 14). The constitutional rights of the petitioner were abundantly guarded at every turn in the proceedings. The Commissioner, the State Board and the New Jersey Supreme Court agreed that their reversal of petitioner's dismissal entitles him to his salary, with the attendant service credit, for the 1954-1955 contract year for which he had been appointed and in which he was serving when the dismissal occurred. All three tribunals were in accord that he had a right to recover everything to which he would have been entitled by law if he had not been dismissed, but that he was not entitled to be additionally rewarded merely because he was dismissed. His effort to carve out of the dismissal a judicial tenure outside of the specifications of the state tenure statutes involved only questions of state law which were properly and fairly resolved on the merits. The effort here is to make federal capital out of an issue that involves no federal question.

Conclusion.

For the reasons hereinabove stated the petition for a writ of certiorari should be denied.

Respectfully submitted,

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December, 1962.